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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO LEON, Defendant and Appellant.	B197632 (Los Angeles County Super. Ct. No. LA042958)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jason C. Tran and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

RELEVANT PROCEDURAL HISTORY

On November 14, 2006, a second amended information was filed against appellant Rodolfo Leon and Jonathan Hernandez, charging them with the murder of Luis Espinoza Ochoa on April 7, 2003 (Pen. Code, § 187, subd. (a)).[1] The information alleged that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that a principal had used a firearm that had caused great bodily injury and death (§12022.53, subds. (b), (c), (d), (e)(1)). Appellant pleaded not guilty and denied the special allegations.

On December 11, 2006, the jury found appellant guilty as charged, and also found the gun use and gang allegations to be true. The trial court sentenced appellant to a term of imprisonment of 25 years to life for the murder, plus a consecutive term of 25 years to life for a gun use enhancement (§ 12022.53, subds. (d), (e)(1)).

FACTS

A. *Prosecution Evidence*

Appellant, Jonathan Hernandez, and Rafael Gonzalez belonged to the Radford Street gang. Their nicknames were, respectively, "Little Shadow," "Little Player," and "Blanco." In April 2003, they lived close to one another near the intersection of Laurel Canyon Boulevard and Vanowen Street, in the area claimed by the Radford Street gang. Ochoa, who did not belong to any gang, resided near a laundromat not far from this intersection. The laundromat was within the Radford Street gang's territory.

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[1] Hernandez is not a party to this appeal. All further statutory references are to the Penal Code, unless otherwise indicated.

Los Angeles Police Department (LAPD) officer Claude Guiral, a gang expert, testified that the members of the Radford Street gang use common signs and symbols, and engage in narcotics sales, vandalism, car burglary, and other theft. There were more than 80 members in April 2003.

According to Guiral, respect is a cornerstone of gang culture. Each gang claims an area as its turf, and asserts dominance over the area against citizens and rival gangs. An unchallenged act of disrespect to a gang member creates the perception that the gang member and his gang are weak, and threatens the gang's control over its turf. Accordingly, gang members retaliate for acts of disrespect. Moreover, to enhance their prestige, gang members often boast about their crimes to friends and fellow members.

Appellant's ex-girlfriend, Roxana Cruz, testified as follows: On April 1, 2003, she, appellant, and their baby were in the laundromat located near the intersection of Laurel Canyon and Vanowen. As she folded her laundry, she saw Ochoa enter the laundromat. Cruz knew Ochoa, and had seen him attack someone eight years earlier. In the laundromat, Ochoa approached appellant and threatened to kill him unless he left. Ochoa appeared to have been drinking. Cruz and appellant reported the incident to police officers, and returned to their residence, which was nearby.[2]

According to Cruz, several days later, she and appellant were driving together when she saw Ochoa walking with another person along Vanowen toward Laurel Canyon. When appellant asked "if that was him," Cruz answered, "Yes, I guess that's him." After they arrived at their residence, appellant drove away alone, and returned 10 to 15 minutes later. Later that evening, appellant told her

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[2] The parties stipulated that appellant reported an alleged threat by Ochoa on April 1, 2003.

that there was a gun in the car, and Cruz told him to get rid of it. When she asked him why he had the gun, he did not answer.

Jenny Valdez, Rafael Gonzalez's ex-girlfriend, testified that she and Gonzalez lived together in April 2003. On the night Ochoa threatened appellant, appellant and Cruz drove to Gonzalez's residence, where appellant told Gonzalez about the incident. During the following week, appellant phoned Gonzalez, who refused to talk to him. Appellant also came to Gonzalez's residence, stood outside, and hailed Gonzalez, but Gonzalez did not respond to appellant. On April 7, 2003, appellant arrived at Gonzalez's residence by car, and called out, "Hey, fool, do me a favor. The guy is in the corner. Come on, let's go." Gonzalez left in appellant's car, which also contained Jonathan Hernandez. As Gonzalez left, he told Valdez he was going along "just to back up [appellant]." Appellant, Gonzalez, and Hernandez returned in less than an hour.

Ramiro Miranda, Ochoa's roommate, testified that shortly after 7:30 p.m. on April 7, 2003, he and Ochoa left the apartment and walked to a nearby liquor store. After Ochoa bought beer, Miranda boarded a bus, and Ochoa began walking back to his apartment.

At approximately 8:30 p.m. on the same date, Los Angeles Police Department (LAPD) officers responded to a radio call about a shooting at Vanowen and Agnes streets, close to the intersection of Vanowen and Laurel Canyon Boulevard. They found Ochoa lying on the street near a 7-11 store. Ochoa had died of gunshot wounds to the head and chest.[3] His body also displayed other injuries not likely to have been caused by a fall to the pavement.

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[3] No bullets or bullet casings were recovered from Ochoa's body or the crime scene, and investigating officers never located eyewitnesses to the shooting.

Ana Gonzalez, Rafael Gonzalez's sister, testified that she was 18 years old at the time of trial, and that in April 2003, she lived in Gonzalez's apartment building. She acknowledged that she knew about the Radford Street gang, but denied "hang[ing] around with them." At approximately 8:00 p.m. on April 7, 2003, she saw appellant arrive at the building by car, and heard him scream for her brother, Rafael. Rafael left the building and walked to appellant's car, which was also approached by Jonathan Hernandez. The threesome drove away toward Laurel Canyon. Later, she saw a helicopter flying over the 7-11 store at the corner of Laurel Canyon and Vanowen, and learned there had been a shooting there.

Ana Gonzalez initially denied that she had any conversation with her brother Rafael about the shooting. She later testified that on the night of the shooting, Rafael told her in a private conversation, "We shot him." In addition, at some point during the conversation he said, "I shot him." Ana Gonzalez also testified that on the date of the shooting, her friend Jonathan Hernandez told her in a private conversation, "We shot somebody." Hernandez did not specify whom he meant by "we." When LAPD Detective Martin Pinner interviewed her two weeks later, she told him about Rafael's and Hernandez's remarks.

Detective Pinner testified that during his investigation of Ochoa's murder, he spoke to Ana Gonzalez. Ana told him that Rafael said to her, "I shot him," and that Hernandez said to her, "We shot him."

The parties stipulated that Natalie and Brisa Gomez, who are sisters, would have testified as follows: At some point after the shooting, they stood outside their apartment building with several individuals, including Hernandez. Rafael Gonzalez approached the group and "stated that he had killed [] Ochoa and that he did not care if they were family or friends"; in addition, he said that he would kill them if they told anyone.

On April 24, 2003, LAPD Officer Juan Rodriguez interviewed appellant, who was in custody. After Officer Rodriguez advised appellant of his *Miranda* rights, he agreed to talk about the shooting.[4] A redacted transcript of the interview was admitted into evidence. During the interview, appellant acknowledged that Cruz and her mother knew Ochoa. He initially described himself as a bystander to Ochoa's shooting with little understanding of the event. According to his initial account, he once drove a car containing Gonzalez and Hernandez. They were "cruising" along Vanown when Gonzalez suddenly directed appellant to park the car two blocks east of Laurel Canyon. Gonzalez and Hernandez left the car while appellant remained in it. Appellant heard some shots, and Gonzalez and Hernandez returned to the car. Appellant learned about Ochoa's death three days later by watching TV.

When Officer Rodriguez pressed appellant for the "whole truth," appellant agreed to tell him "everything." According to appellant, on the date of the shooting, he was driving with Cruz and their daughter when he saw Ochoa, who had previously threatened to kill him in the laundromat. Appellant believed Ochoa's threat was genuine. After appellant dropped off Cruz and his daughter, he saw Gonzalez and Hernandez, who knew about the incident in the laundromat. After appellant said that he simply wanted to "rough [Ochoa] up," they replied, "No, he needs to get fucked up." When appellant insisted that he was "not going to do it," they responded, "Okay, then, leave it to us two." As he drove them to Ochoa's location, he told them, "I don't want to do anything," and added, "if we do something, they're going to fuck us up, . . . because I made the report." After he parked the car, he watched from afar as they confronted Ochoa, and heard

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

gunshots. When they returned to the car, they said, "We fucked him up." Hernandez later told appellant that Gonzalez had shot Ochoa.

B. *Defense Evidence*

Steven Strong, a private investigator, testified that he acquired expertise regarding gangs when he was employed as an officer for LAPD. He opined that only a gang "wannabe" -- someone who wants to belong to a gang, but has not been accepted by it -- would have responded to a threat to himself and his family by reporting the incident to the police; a full-fledged gang member would have confronted the threatening individual. He also opined that an individual who could not immediately rally gang members to help him was likely to be a "wannabe." According to Strong, when gang members agree to assist a "wannabe" in a confrontation, it is likely that the confrontation is expected to be small in scale, and not involve guns.

DISCUSSION

Appellant contends (1) that the trial court erred in declining to instruct the jury regarding the statements of accomplices, (2) that the trial court misinstructed the jury regarding aiding-and-abetting liability, and (3) that he received ineffective assistance of counsel.

A. *Accomplice Instructions*

Appellant contends that the trial court erred in failing to give accomplice instructions because the prosecution relied on Rafael Gonzalez's and Jonathan Hernandez's out-of-court statements to Ana Gonzalez and the Gomez sisters. We disagree.

Under section 1111, a defendant may not be convicted "upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ."[5] As Witkin and Epstein explain: "[W]here the prosecution relies on accomplice testimony, the defendant is entitled to an instruction to this effect. [Citations.] The instruction must be given on the court's own motion." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 654, p. 941.) CALJIC No. 3.10 defines the term "accomplice," CALJIC Nos. 3.11 and 3.12 state the requirement for corroboration of accomplice testimony, and CALJIC No. 3.18 cautions the jury to view such testimony with "care and caution."

The key issue before us is whether the admission of Rafael Gonzalez's and Jonathan Hernandez's statements to Ana Gonzalez and the Gomez sisters triggered the trial court's duty to give accomplice instructions. In some circumstances, section 1111 encompasses an accomplice's out-of-court statements when they "are used as substantive evidence of guilt." (*People v. Andrews* (1989) 49 Cal.3d 200, 214.) The duty to give accomplice instructions when the prosecution relies on out-of court statements is ultimately traceable to *People v. Belton* (1979) 23 Cal.3d 516 (*Belton*). There, the defendant was charged with discharging a firearm into an inhabited dwelling. (*Id*. at p. 519.) During a bench trial on the charge, the prosecution called as a witness the defendant's stepson, who asserted that neither he nor his stepfather had participated in the shooting. (*Ibid*.) To impeach this testimony, the prosecution also called a deputy sheriff, who testified that the

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5 An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial. (§ 1111.)" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

stepson had admitted during an interview that he and his stepfather had done the shooting. (*Ibid*.) The deputy sheriff's testimony was the sole evidence implicating the defendant in the crime. (*Ibid*.)

After the defendant unsuccessfully moved for judgment of acquittal (§ 1118) on the ground that the stepson's out-of-court statements were uncorroborated, the trial court found the defendant guilty as charged. (*Belton*, *supra*, 23 Cal.3d at pp. 519-520.) In reversing the judgment, our Supreme Court concluded that the stepson's out-of-court statements constituted testimony for the purposes of section 1111: "'The rationale for requiring corroboration of an accomplice is that the hope of immunity or clemency in return for testimony which would help to convict another makes the accomplice's testimony suspect, or the accomplice might have many other self-serving motives that could influence his credibility. [Citation.]'" (*Belton*, *supra*, 23 Cal.3d at p. 525, quoting *People v. Marshall* (1969) 273 Cal.App.2d 423, 427.)

In *People v. Sully* (1991) 53 Cal.3d 1195, 1229-1230 (*Sully*), the Supreme Court clarified that some out-of-court statements by an accomplice do not trigger the duty to give accomplice instructions. In *Sully*, the defendant was alleged to have murdered a drug dealer with a sledgehammer. (*Id*. at p. 1214.) At trial, a witness testified that immediately after the murder, the defendant's accomplice described the sledgehammer murder to the witness. (*Ibid*.) Our Supreme Court held that the accomplice's out-of-court remarks were properly admitted as spontaneous statements (Evid. Code, § 1240), and that as such, they did not constitute "consciously self-interested and calculated" remarks requiring accomplice instructions. (*Sully, supra,* 53 Cal.3d at pp. 1229-1230).

In *People v. Jeffery* (1995) 37 Cal.App.4th 209, 216-218 (*Jeffery*), the appellate court sought to reconcile *Sully* with *Belton*. There, the defendant was

charged with manufacture and sale of illegal drugs. (*Id*. at p. 212.) At trial, a police officer testified regarding his conversations with a co-defendant while the officer had worked "undercover" as a potential buyer of the drugs. (*Id*. at pp. 212-213.) The Court of Appeal held that this testimony did not oblige the trial court to give accomplice instructions because the co-defendant's remarks arose in a context that rendered them trustworthy: "From *Belton,* we conclude that 'testimony' within the meaning of [] section 1111 includes all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. These circumstances are most likely to induce self-serving motives and hence untrustworthy and unreliable evidence." (*Jeffery, supra,* 37 Cal.App.4th at p. 218.) Citing *Sully,* the court in *Jeffery* added: "On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as 'testimony' and hence need not be corroborated under [] section 1111." (*Jeffery, supra*, at p. 218.)

In *People v. Williams* (1997) 16 Cal.4th 153 (*Williams*), the Supreme Court impliedly approved the analysis in *Jeffery*. In *Williams*, a witness testified that while he and the defendant's accomplice were ingesting drugs in an alley, the accomplice said that at the defendant's behest, he had "take[n] care of some business," namely, made a threat. (*Id*. at p. 198.) Pointing to *Jeffery*, the court held that the accomplice's remarks were not testimony under section 1111, reasoning that the accomplice had spoken to a fellow drug user while not in custody, and thus his remarks were "'not given under suspect circumstances.'" (*Williams, supra,* 16 Cal.4th at p. 246, quoting *Jeffery, supra*, 37 Cal.App.4th at

p. 218.) The court stated: "The record discloses no substantial motive for [the accomplice] then to dissemble." (*Ibid*.)

The Supreme Court reached a similar conclusion in *People v. Davis* (2005) 36 Cal.4th 510. There, the trial court admitted a recording of a discussion between the defendant and his co-defendants while they were incarcerated. (*Id*. at p. 547.) The court held that the co-defendants' remarks were not testimony under section 1111 because there was no danger of self-interested motives for the co-defendants' remarks, which "were made to each other and to [the] defendant in a conversation in a jail cell that all three apparently believed to be private." (*Davis, supra,* 36 Cal.4th at p. 547.)

Here, appellant argues that Rafael Gonzalez's and Jonathan Hernandez's remarks to Ana Gonzalez and the Gomez sisters were the mere product of peer pressure and braggadocio, and thus were unreliable. In our view, the record supports no such inference. Ana Gonzalez testified that on the night of Ochoa's death, she had a private conversation with her brother Rafael, who told her, "We shot him" and "I shot him;" she also testified that on the same night, she had a private conversation with her friend, Jonathan Hernandez, who said, "We killed him." Ana provided no further details about the conversations, and Detective Pinner testified only that Ana had reported these remarks to him. As "[t]he record discloses no substantial motive for [Rafael and Hernandez] then to dissemble," their remarks to Ana did not constitute testimony under section 1111. (*Williams, supra*, 16 Cal.4th at p. 246.)

Nor do the circumstances surrounding Rafael Gonzalez's remarks to the Gomez sisters raise the reasonable inference that the remarks stemmed from motives that rendered them "untrustworthy and unreliable evidence." (*Jeffery, supra*, 37 Cal.App.4th at p. 218.) According to the stipulation regarding the

Gomez sisters' proposed testimony, Gonzalez approached the sisters and other individuals, including Hernandez, stated that he had killed Ochoa, and threatened to kill anyone who disclosed his conduct. As Gonzalez's apparent motive was to impede a police investigation into Ochoa's murder, he had no reason to dissemble, and thus his statements cannot reasonably be regarded as untrustworthy.

Moreover, any instructional error was not prejudicial. As our Supreme Court has explained: "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

Here, Gonzalez's and Hernandez's remarks to Ana Gonzalez and the Gomez sisters were corroborated by appellant's own statements to Officer Rodriguez, which depicted Gonzalez and Hernandez as Ochoa's killers. In addition, aside from the remarks, there was ample evidence that appellant aided and abetted Ochoa's murder: the record discloses independent evidence that Ochoa threatened appellant; that appellant repeatedly sought help in confronting Ochoa from Gonzalez; that appellant drove Gonzalez and Hernandez toward Ochoa's location after appellant saw Ochoa; and that Ochoa was killed shortly thereafter. Under these circumstances, there is no reasonable probability that appellant would have

obtained a more favorable result had the jury received accomplice instructions.[6] (*People v. Lewis, supra*, 26 Cal.4th at p. 370.) In sum, the failure to give accomplice instructions was not reversible error.

B. *Aiding and Abetting Instructions*

Appellant contends that the jury was erroneously instructed regarding liability for aiding and abetting. Pointing to *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza*), appellant contends that the trial court gave inadequate instruction regarding the mental state required for liability as an aider and abettor.

The prosecution asserted two principal theories under which the jury could find appellant liable for Ochoa's murder as an aider and abettor: (1) that appellant had aided and abetted the murder, and (2) that appellant had aided and abetted an assault or battery on Ochoa, the natural and probable consequences of which included Ochoa's murder. The jury received several instructions regarding these theories, including a modified version of CALJIC No. 3.01, which stated in pertinent part: "A person aids and abets the commission or attempted commission of a crime when he: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime."

The crux of appellant's contention is that the jury received no instruction that adequately described the "specific intent" required for liability as an aider and abettor, as determined in *Mendoza*. As explained below, he is mistaken. In

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[6] Appellant argues that the failure to give accomplice instructions must be assessed for prejudice as federal constitutional error. We disagree. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 371.)

Mendoza, the defendant was tried for murder as an aider and abettor. (*Mendoza*, *supra*, 18 Cal.4th at p. 1126.) At trial, the prosecutor presented evidence that the defendant and his two co-defendants attended a party, where the defendant became drunk. (*Id*. at pp. 1118-1119.) They became involved in a fight, and left the party to help a friend find medical treatment. (*Id*. at p. 1119.) When the defendant and his co-defendants returned to the party, a co-defendant fired a rifle at some dancers, killing one of them. (*Id*. at p. 1121.) The jury was instructed with a version of CALJIC No. 3.01; however, over the defendant's objection, the trial court instructed the jury that voluntary intoxication was a defense to a crime only "'where a specific intent or knowledge is an essential element of a crime.'" (*Mendoza*, *supra*, 18 Cal.4th at pp. 1121-1122.)

The court in *Mendoza* addressed what it characterized as a "narrow question," namely, the extent to which defendants tried as aiders and abettors may present evidence of voluntary intoxication on the question whether they possessed the mental state required for liability as aiders and abettors. (*Mendoza*, *supra*, 18 Cal.4th at p. 1126.) As the outset, the court cautioned that "[t]he division of crimes into two categories, one requiring 'general intent' and one 'specific intent'" was "simplistic," "potentially confusing," and prone to "conceptual difficulties." (*Id*. at pp. 1126-1127.) The court focused its inquiry on one employment of the dichotomy, under which the term "'specific intent crime'" designates an offense to which voluntary intoxication is relevant, and the term "general intent crime" designates an offense to which voluntary intoxication is not relevant. (*Ibid*.)

The court went on to hold that an offense committed by an aider and abettor involves a "specific intent" because intoxication is relevant to existence of the mental state required for liability as an aider and abettor. (*Mendoza*, *supra*, 18 Cal.4th at pp. 1128-1129, 1132.) The court reasoned: "Unlike the act of the direct

perpetrator, the act of the aider and abettor is not inherently criminal. Indeed, the aider and abettor's act may be, and often is, innocuous when divorced from the culpable mental state. . . . For example, the act of handing a baseball bat to another person is not itself criminal. . . . However, if the person committing that act *knows* that the other person will hit a third person over the head with the bat, and *intends* to facilitate that further act, the person can be criminally liable as an aider and abettor for that further act and for any other crime actually committed that is a reasonably foreseeable consequence of the intended crime. . . . [T]he alleged aider and abettor is liable for that inherently criminal act only if the necessary mental states of knowledge and intent exist." (*Id.* at p. 1129.) The court concluded: "*Awareness* of the direct perpetrator's purpose is critical for the alleged aider and abettor to be culpable for that perpetrator's act. A person may lack such awareness for many reasons, including intoxication. A person who is actually unaware that his or her noncriminal act might help another person commit a crime should not be deemed guilty of that crime and all of its reasonably foreseeable consequences even if intoxication contributes to, or is the sole reason for, that lack of awareness." (*Ibid.*)

In so concluding, the court clarified that its analysis encompassed aiding-and-abetting liability for any crime, including those crimes whose elements require the perpetrator to have a "specific intent": "The mental state required for an aider and abettor is the same for all crimes and is independent of the perpetrator's mental state." (*Mendoza*, *supra*, 18 Cal.4th at p. 1132.) It also cautioned: "Our holding is very narrow. Defendants may present evidence of intoxication solely on the question whether they are liable for criminal acts as aiders and abettors. Once a jury finds a defendant did knowingly and intentionally aid and abet a criminal act, intoxication evidence is irrelevant to the extent of criminal liability. A person who

knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether judged objectively, it was reasonably foreseeable. [Citation.] Intoxication is irrelevant in deciding what is reasonably foreseeable." (*Id*. at p. 1133, italics omitted.)

We see nothing in *Mendoza* that supports appellant's contention that CALJIC No. 3.01 misdescribes the mental state required for liability as an aider and abettor. The court in *Mendoza* did not announce a new mental state required for aider-and-abettor liability; instead, it determined that the mental state ordinarily required for such liability is properly classified as a form of "specific intent" because evidence of intoxication is relevant to its existence. As CALJIC No. 3.01 fully comports with the court's characterization of the requisite mental state, it is an adequate instruction on the mental state.

Our conclusion on this question finds additional support within *Mendoza*. Although the court in *Mendoza* did not determine the adequacy of the instructions in the underlying trial, the court offered the following guidance: "Our conclusion also makes the law understandable to the jury. If the court gives *any* instruction at all on the relevance of intoxication [citation], it might *simply* instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. It might also instruct that the intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the target crime. The court would not additionally be required to parse out those elements of each crime charged for which the evidence could be considered or distinguish between the knowledge and the intent requirements [of the mental state required for aiding-and-abetting liability]."

(*Mendoza, supra*, 18 Cal.4th at p. 1134, italics added.) These remarks convey an implied approval of CALJIC No. 3.01, as they suggest that evidence of intoxication requires only supplemental instructions explaining the relevance of intoxication to the existence of the mental state described in CALJIC No. 3.01.

Mendoza thus does not challenge the adequacy of CALJIC No. 3.01 as a characterization of the mental state required for aiding-and-abetting liability. Indeed, following *Mendoza*, the Supreme Court has described the requisite mental state in terms that track CALJIC No. 3.01. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) In sum, there was no instructional error regarding aiding and abetting.

C. *Ineffective Assistance of Counsel*

Appellant contends that his trial counsel, Anthony Rayburn, rendered ineffective assistance (1) by failing to object to the evidence regarding Rafael Gonzalez's and Jonathan Hernandez's remarks to Ana Gonzalez about Ochoa's death, and (2) by stipulating that Natalie and Brisa Gomez would have testified that Rafael Gonzalez said that he killed Ochoa. In our view, appellant is mistaken.[7] Generally, "[w]hether to object to arguably inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence." (*People v.*

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[7] "In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

Maury (2003) 30 Cal.4th 342, 415-416.) In such cases, we will discern ineffective assistance only when "the record on appeal demonstrates counsel had no rational purpose for the failure to object." (*People v. Lucas* (1995) 12 Cal.4th 415, 445.)

Assuming -- without deciding -- that the evidence of Gonzalez's and Hernandez's remarks was subject to meritorious objections, the record discloses a rational tactical basis for Rayburn's conduct. A key element of appellant's defense was his description of Ochoa's shooting, as provided to Officer Rodriguez. After making evasive initial remarks, appellant told Rodriguez that on the date of the shooting, he saw Ochoa and then found Gonzalez and Hernandez. Whereas appellant wanted only to "rough [Ochoa] up," he learned that his friends were determined to "fuck him up." According to appellant, he tried to dissuade Gonzalez and Hernandez and did what he could to resist their plan. When appellant said that he was "not going to do it," they answered, "Okay, then, leave it to us two." Moreover, appellant told them, "I don't want to do anything," and, "[I]f we do something, they're going to fuck us up, . . . because I made the report." He then remained near the parked car while they shot Ochoa.

In closing argument, Rayburn relied on appellant's account of the underlying events in an attempt to establish that appellant had, in fact, withdrawn his support for Gonzalez's and Hernandez's plan, and thus was not liable for their actions as an aider and abettor.[8] To enhance the credibility of appellant's account, Rayburn could reasonably have elected to forego objections to the evidence of Gonzalez's and Hernandez's remarks. The remarks directly inculpated Gonzalez and

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[8] As nothing before us suggests that appellant's statement to Officer Rodriguez was inadmissible and appellant offers no basis for excluding it, Rayburn's selection of a defense strategy predicated on the account cannot be regarded as unreasonable.

Hernandez without specifying appellant as a participant, and thus tended to corroborate appellant's account, which depicted Gonzalez and Hernandez as the true culprits. Accordingly, the record shows a "rational purpose for the failure to object." (*People v. Lucas*, *supra*, 12 Cal.4th at p. 445.)

Moreover, we would not find prejudice from Rayburn's performance, even if it were deficient. Aside from the remarks in question, appellant's statements to Officer Rodriguez provided otherwise undisputed evidence that Gonzalez and Hernandez confronted and shot Ochoa. In addition, as we have explained (see pt. A, *ante*), there was considerable evidence independent of the remarks establishing that appellant aided and abetted Ochoa's murder. Accordingly, it is not reasonably likely that appellant would have obtained a more favorable outcome had the evidence been excluded. (*People v. Jennings*, *supra*, 53 Cal.3d at p. 357.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.